92-339

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

DR. RICHARD K. BOWERS,
Petitioner,

VS.

WESLEY TAYLOR,
Respondent.

Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is a physician who treats, rather than ignores, a prisoner's serious medical condition entitled to qualified immunity, when there is no expert evidence that the physician's treatment is such a substantial departure from accepted professional treatment as to be deliberately indifferent?

2. Does the Eleventh Amendment to the United States Constitution bar a pendent state-law negligence claim for damages against a state official in his individual capacity?

LIST OF PARTIES

The parties to the proceedings in the United States Court of Appeals for the Eighth Circuit were the petitioner, Dr . Richard K. Bowers, and the respondent, Wesley Taylor. Dr. Kent Grewe and Dr. Carl R. Doerhoff were separate appellants in the court below, which held that they were entitled to qualified immunity on the federal claims against them. Therefore, they are not named as parties herein.

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PETITION FOR WRIT OF CERTIORARI

The petitioner, Dr. Richard K. Bowers, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled proceeding on June 10, 1992.

OPINIONS BELOW

The Opinion of the Court of Appeals for the Eighth Circuit is not yet reported, and is reprinted in the appendix hereto at page A-1 and A-18. The Order of the District Court is not reported, and is reprinted in the appendix hereto at page A-13. The Report, Recommendation, and Order of the Magistrate is not reported, and is reprinted in the appendix hereto at page A-14.

JURISDICTION

Invoking federal jurisdiction under 28 U.S.C. § 1331 and the doctrine of pendent jurisdiction, the respondent brought this suit in the United States District Court, Western District of Missouri. The District Court denied petitioner's motion for summary judgment based upon qualified immunity. See pages A-13 and A-14 herein.

On petitioner's appeal, the Court of Appeals for the Eighth Circuit, on June 10, 1992, entered a judgment and opinion affirming the District Court's order with respect to petitioner. See page A-1 herein. A timely petition for rehearing or rehearing en banc was filed on June 24, 1992, and was denied on July 31, 1992. See page A-18 herein. The Court of Appeals also on July 31, 1992, modified its opinion. See page A-18 herein. The jurisdiction of this Court to review the judgment of the court of appeals is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Respondent Wesley Taylor, a prisoner at the Missouri State Penitentiary in Jefferson City, Missouri, brought a 42 U.S.C. § 1983 and a pendent state-law negligence action alleging that petitioner Dr. Richard K. Bowers and Dr. Kent Grewe and Dr. Carl R. Doerhoff were deliberately indifferent to the prisoner's serious medical needs by intentionally delaying surgery for his ruptured appendix in an effort to coerce an admission that he had swallowed drug-filled balloons. After discovery had been completed, which included interrogatories, requests for production of documents and depositions, all three physicians moved for summary judgment. With respect to the prisoner's civil rights claim, the physicians moved for summary judgment on the basis of qualified immunity, claiming that they did not know and should not have known that their actions violated the prisoner's constitutional rights. With respect to the prisoner's state-law negligence claim, the physicians moved for summary judgment

on the basis that the Eleventh Amendment bars state-law claims against state officials in federal court.

In opposition to the motion for summary judgment, the prisoner submitted the affidavit of a fourth physician, stating that prior to the prisoner's exploratory surgery, the prisoner was never treated for pain, received no hydration or provision for maintenance of his nutritional status, no identifiable course of medical treatment was ordered or prescribed, no identifiable course of diagnostics was ordered, a surgical consult was not obtained, his medical condition worsened, yet he received no medical treatment; and that subsequent to his exploratory surgery, he was not seen or examined on a daily basis by any physician. The prisoner was also permitted to file a Second Amended Complaint. The District Court, relying upon this affidavit, denied the motion for summary judgment, ruling that none of the three physicians were entitled to qualified immunity.

The Court of Appeals reversed the denial of summary judgment with respect to Dr. Grewe and Dr. Doerhoff, ruling that they were entitled to qualified immunity. Dr. Grewe admitted the inmate to the hospital on February 1, 1987, for observation for a small-bowel obstruction. At that time, the prisoner exhibited a generalized, fairly non-specific-type of abdominal pain, no rebound tenderness (a common symptom of a ruptured appendix), a normal white blood cell count, normal bowel movement, and no nausea or vomiting. No one, including the prisoner, told Dr. Grewe that the prisoner had vomited blood. Dr. Grewe's clinical notes did not indicate that the prisoner had vomited blood or that he was suspected of swallowing drug-filled balloons. Dr. Grewe was not aware that others suspected that the prisoner had swallowed contraband. Dr. Grewe ordered a full liquid diet; Reglan, 20 milligrams, three times a day, and Phenergan, 25 milligrams, through the mouth or intramuscularly every six hours (a medicine which indirectly eases minor pain); no further laboratory work except obtaining a stool specimen for

ova and parasites and a urinalysis; vital signs four times a day; and no intravenous fluid. Dr. Grewe left the hospital at the end of his shift that day and did not return until February 10, 1987.

Dr. Doerhoff performed a celiotomy on February 4, 1987, and discovered a ruptured appendix and liquid stool throughout the prisoner's abdomen. Before performing surgery, Dr. Doerhoff was of the opinion that the prisoner had a small-bowel obstruction, because he lacked the high white blood cell count and rigid abdomen characteristic of most appendicitis patients. Dr. Doerhoff was aware that the prisoner was suspected of swallowing contraband. Dr. Doerhoff was also of the opinion that the possibility that the prisoner had swallowed contraband was within the differential diagnosis, because it was common for prisoners to swallow lots of things, including contraband. Dr. Doerhoff was also of the opinion that there was no delay in surgery considering the prisoner's symptoms, white blood cell count, and temperature .

The Court of Appeals affirmed the denial of summary judgment with respect to Dr. Bowers, ruling that he was not entitled to qualified immunity The Court of Appeals reasoned that there was sufficient evidence to create a genuine issue as to whether Dr. Bowers delayed surgery in order to coerce a confession that the prisoner had swallowed drug-filled balloons. Dr. Bowers was the prisoner's attending physician while he was hospitalized prior to his surgery. During his hospitalization and prior to his surgery, the prisoner vomited blood, and a nasogastric tube was inserted. At 9:00 a.m. on February 3, Dr. Bowers learned that the prisoner had removed the nasogastric tube, and he ordered an x-ray which showed a small-bowel obstruction. At noon on February 3, Dr. Bowers became aware that the prisoner was suspected of swallowing contraband. Thereafter, Dr. Bowers questioned the prisoner about whether he had swallowed contraband, the prisoner denied swallowing anything, and Dr. Bowers believed the prisoner's denial and urged him to permit the

reinsertion of the nasogastric tube. The prisoner agreed to reinsertion of a nasogastric tube, but removed it at 6:30 p.m. on February 3, and subsequently twice refused its reinsertion. The prisoner vomited more blood. At 5:20 p.m. on February 4, Dr. Bowers requested Dr. Doerhoff to perform surgery. Dr. Bowers would have called the surgeon sooner had the prisoner kept the nasogastric tube in place or had he disbelieved the prisoner's denial of swallowing contraband.

Because the Court of Appeals considered Dr. Grewe and Dr. Doerhoff to be entitled to qualified immunity, it discussed whether the Eleventh Amendment bars the state-law negligence claim with respect to Dr. Bowers only. The Court of Appeals reasoned that *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 117 (1984), prohibits a federal suit against state officials on the basis of state law only when the sought-after relief has a direct impact on the state. The Court of Appeals was incorrect when it asserted that Dr. Bowers was sued in his official, in addition to his individual, capacity, because the prisoner does seek any injunctive or declaratory relief, and Dr. Bowers is no longer an employee of the state.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT, WHEN IT DENIED QUALIFIED IMMUNITY TO A PHYSICIAN WHO TREATED, RATHER THAN IGNORED, A PRISONER'S SERIOUS MEDICAL CONDITION, AND THERE WAS NO EXPERT EVIDENCE THAT THE PHYSICIAN'S TREATMENT WAS DELIBERATELY INDIFFERENT.

On motion for summary judgment based upon qualified immunity, when a physician adduces evidence of the course of his treatment of a prisoner and the reasons for it, the physician should be entitled to qualified immunity, unless the prisoner responds with expert evidence that the physician's treatment was such a substantial departure from accepted professional judgment as to be deliberately indifferent. This rule is similar to that of *Youngberg v. Romero*, 457 U.S. 307, 323 (1982), which requires, for proof of violation of the involuntarily civilly committed's Fourteenth Amendment rights, that a physician's or other professional's treatment was a substantial departure from accepted professional judgment. This rule is dissimilar to that of *Youngberg v. Romero* in that it requires expert evidence to show deliberate indifference, rather than such evidence to show the absence of professional judgment. This case, and others, illustrate that such a rule is needed to protect physicians from prisoners' medically unsubstantiated Eighth Amendment claims.

In this case, the prisoner argued that the physician delayed surgical intervention in order to coerce him into admitting that he swallowed drug-filled balloons. The physician argued that he was treating the prisoner for a small-bowel obstruction by reinsertion of a nasogastric tube to induce spontaneous relief, and

reevaluation after decompression occurs or not. The Court of Appeals denied qualified immunity to the physician, reasoning that the physician's questioning of the prisoner about whether he swallowed contraband, *not* the prisoner's expert evidence, created a genuine issue as to whether the physician delayed surgical intervention to coerce the desired-for admission. The Court of Appeals believed such an issue existed, in spite of the fact that the surgeon, upon whom it bestowed qualified immunity, testified that in his opinion the possibility that the prisoner swallowed contraband was within the differential diagnosis and there was no delay in surgery, considering that the prisoner did not have a high white blood cell count or rigid abdomen; and in spite of the fact that the Court stated that the affidavit of the fourth physician, upon which the Magistrate relied to recommend denial of qualified immunity, "merely creates an inference of negligence upon the part of all the defendants " (Appendix, A-9.)

As the Court of Appeals recognized, the expert evidence adduced by the prisoner in response to the motion for summary judgment does not express an opinion that the physician's treatment was such a substantial departure from accepted professional judgment as to be deliberately indifferent. The prisoner's expert evidence merely expresses a difference of medical opinion over whether the prisoner needed more hydration and nutrition than Dr. Grewe ordered, and whether the prisoner needed surgical intervention sooner than Dr. Bowers thought. Dr. Bowers did, in fact, order a course of diagnostics and treatment — reinsertion of a nasogastric tube to spontaneously relieve the small-bowel obstruction, and reevaluation after decompression occurs or not.

Though not cited in its opinion as authority, *Smith v. Jenkins*, 919 F.2d 90 (8th Cir. 1991), illustrates the Court of Appeals' reasoning. In that case, prior to his incarceration, Smith was prescribed medication for a psychiatric disorder. Upon incarceration, a physician examined Smith and terminated his medication based upon the physician's clinical judgment that the

medication was not medically indicated. The District Court granted summary judgment to the physician based upon the physician's affidavit, which apparently was not responded to by the prisoner. The Court of Appeals reversed, holding that Smith was entitled to prove that the physician's course of treatment, or lack thereof, so deviated from professional standards that it amounted to deliberate indifference.[1]

As shown by this case and *Smith v. Jenkins*, the Court of Appeals has decided that a physician who treats, rather than ignores, a prisoner's serious medical condition is not entitled to qualified immunity, though there is no expert evidence that the physician's treatment is deliberately indifferent. Such a rule does not protect physicians from medically unsubstantiated Eighth Amendment claims.

II. THE COURT OF APPEALS FOR THE EIGHTH CIRCUIT'S DECISION THAT THE ELEVENTH AMENDMENT DOES NOT BAR A PENDENT STATE-LAW NEGLIGENCE CLAIM FOR DAMAGES AGAINST A STATE OFFICIAL IN HIS INDIVIDUAL CAPACITY CONFLICTS WITH THE COURT OF APPEALS FOR THE FIFTH CIRCUIT'S DECISION ON THE SAME MATTER.

Pennhurst State School and Hospital v. Halderman, 465 U.S. 89, 106 (1984) (*Pennhurst II*), bars claims based on violations of state law and seeking prospective or retroactive injunctive relief against state officials in their official capacity. When a suit is brought against state officials, as opposed to the state itself or its agencies, suit is barred when "'the state is the real, substantial

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[1] This case is unlike *Smith v. Jenkins* in that the prisoner in this case obtained expert evidence, which was insufficient, whereas Smith was denied even an opportunity to obtain such evidence. *Smith v. Jenkins*, *supra*, 919 F.2d at 93, n. 4.

party in interest."' *Pennhurst, supra,* 465 U.S. at 101, quoting *Ford Motor Co. v. Dept. of Treasury of Indiana*, 323 U.S. 459, 464 (1945). The state is the real party in interest if the decision rendered in a case would operate against the sovereign, expend itself from the public treasury, interfere with public administration, or compel the state to act or refrain from acting. *Pennhurst, supra,* 465 U.S. at 101; *Dugan v. Rank*, 372 U.S. 609, 620 (1963).

Pennhurst II applies to claims based on violations of state law and seeking damages against state officials in their individual capacity. The state is the real, substantial party in interest "because the State poses a paramount interest [as opposed to the federal government] in overseeing the nature and extent of the common-law liability imposed by its courts, and defining the immunity available to its officials." *Hughes v. Savell*, 902 F.2d 376, 378 (5th Cir. 1990) (holding the Eleventh Amendment bars a state-law negligence claim for damages against a state official in his individual capacity); see also *Rannels v. Hargrove*, 731 F. Supp. 1214, 1217 (E.D. Pa. 1990). Any federal judicial award of damages, or any federal judicial ruling concerning the nature and extent of state-law negligence liability and the defenses thereto, would interfere with public administration, because either a damages award or an interpretation of state law indirectly affects the conduct of state officials. Any judgment against a Missouri official would be paid from the state treasury. Mo. Rev. Stat. § 105.711 (1991 Cum. Supp.).

The Court of Appeals' citations to *DeYoung v. Patten*, 898 F.2d 628, 635 (8th Cir. 1990), and *Nix v. Norman*, 879 F.2d 429, 432-433, & n. 3 (8th Cir. 1989), for the proposition that the Eleventh Amendment does not bar a suit for damages against a state official in his individual capacity, are inapposite. Neither case involves a state-law or an individual-capacity claim. There is no official-capacity claim involved in this case because the prisoner seeks only damages and the physician is no longer a state official.

CONCLUSION

For all the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 90-2539

Wesley Taylor,
Appellee,

v.

Richard K. Bowers; Carl Doerhoff; Kent Grewe,
Appellants.

Maryland Butts; Helen Farr; Loren Stout.

Appeal from the United States District Court
for the Western District of Missouri.

Submitted: February 12, 1992
Filed: June 10, 1992

Before McMILLIAN, Circuit Judge, BRIGHT, Senior Circuit Judge, and LOKEN, Circuit Judge.

BRIGHT, Senior Circuit Judge.

I. INTRODUCTION

Appellants Richard K. Bowers, D.O., Kent Grewe, M.D., and Carl R. Doerhoff, M.D., each of whom is sued individually and in his official capacity as an employee of the Missouri Department of Corrections and Human Resources, appeal from the district court's denial of their motion for summary judgment on appellee Wesley Taylor's claims under 42 U.S.C. § 1983 (1988). On appeal, they allege: (1) they are entitled to summary judgment on the basis of qualified immunity and (2) the eleventh amendment bars Taylor's state law malpractice claims. We conclude that summary judgment is appropriate for Grewe and Doerhoff, who are entitled to qualified immunity, but not for Bowers. Accordingly, we affirm in part and reverse in part.

II. BACKGROUND

Wesley Taylor is an inmate at the Missouri State Penitentiary [MSP] in Jefferson City, Missouri. He alleges that in the early morning of February 1, 1987, he experienced stomach pains and vomited blood. Taylor reported to the MSP hospital at approximately 1:00 p.m., where he was examined by Dr. Kent Grewe. Taylor alleges that he told Grewe that he had repeatedly thrown up blood and experienced a severe burning pain in his stomach. Taylor also alleges that Grewe questioned him about drug ingestion, which Taylor denied.

After an examination, Grewe concluded that Taylor had a small bowel obstruction. Grewe admitted Taylor to the MSP hospital for observation. Taylor alleges that he continued to experience severe pain and vomit blood. In the evening of February 2, Taylor alleges, a (non-defendant) doctor recommended the transfer of Taylor to the University of Missouri-Columbia Medical Center "ASAP." This transfer failed to materialize until two weeks later. Taylor alleges that on February 2 or 3, nurse Karen Zumwalt told him that Doctors Grewe and Bowers suspected that he had swallowed drug-filled balloons. Zumwalt also indicated, according to Taylor, that nothing would be done for him until he confessed to swallowing the balloons. Taylor denied the accusations.

Taylor alleges that he continued to experience great pain and vomit repeatedly. On February 4, after allegedly being subjected to repeated questioning by nurses and doctors about the drug-laden balloons, Dr. Doerhoff performed exploratory surgery. Doerhoff found that Taylor's appendix had ruptured. Doerhoff removed the appendix and treated Taylor.

Taylor alleges that he continued to experience stomach pains and vomiting after the surgery. He was transferred to the University of Missouri-Columbia Hospital on February 16. Doctors performed a second surgery to drain an abscess. Taylor

alleges that Doerhoff's improper treatment necessitated the second surgery.[1]

Taylor sued Grewe, Doerhoff and Bowers under 42 U.S.C. § 1983, 42 U.S.C. § 1985, and state negligence law. In his section 1983 claim, set forth in count I, he alleged that the defendants had been deliberately indifferent to his serious medical needs. In his section 1985 claim (count II), he alleged that the defendants conspired to deprive him of urgently needed medical treatment in violation of his rights under the fourteenth amendment and section 1983. Count III set forth the bases for Taylor's negligence claims against Grewe, Bowers and Doerhoff.

The defendants moved for summary judgment on counts I and II, raising the defense of qualified immunity. They also moved to dismiss the negligence count for lack of jurisdiction. After reviewing the depositions, suggestions and affidavits submitted by the parties, the Magistrate Judge concluded that a dispute over material facts precluded the entry of summary judgment. Specifically, the Magistrate Judge relied upon the affidavit of Dr. Glenn A. Barr, which stated that Taylor did not receive necessary medical care. Barr also stated that the deficiency of the pre- and post-operative care damaged Taylor.[2] App. 464-65. After de novo review of the record, the district court denied the defendants' summary judgment motion. App. 471. This appeal followed.

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[1] The preceding overview represents a summary of the factual allegations before the district court at the summary judgment phase. We will elaborate upon the facts established by the record as necessary to dispose of Taylor's arguments on appeal.

[2] Counsel for Taylor conceded at oral argument that Barr is not qualified as an expert in prison treatment.

III. DISCUSSION

As a preliminary matter, we note that we have jurisdiction to hear this appeal even though the district court has not yet rendered a final judgment. To the extent that a district court's denial of a claim of qualified immunity turns upon an issue of law, the denial is an appealable final decision within the meaning of 28 U.S.C. § 1291 (1988), notwithstanding the absence of a final judgment. *Johnson v. Hay*, 931 F.2d 456, 459 (8th Cir. 1991) [*Hay*] (citing *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985)); *Givens v. Jones*, 900 F.2d 1229, 1231 (8th Cir. 1990) (citing 472 U.S. at 530). Even when an appeal from the denial of summary judgment implicates fact-based issues, we have held that we have jurisdiction when the record fails to establish a triable issue of fact and can be decided as a matter of law, *Hay*, 931 F.2d at 460 (citing *Wright v. South Arkansas Regional Health Ctr., Inc.*, 800 F.2d 199, 203 (8th Cir. 1986)) or when the appeal presents the largely legal question of whether an official's acts violate clearly established law of which a reasonable person would have known. *Id.* We thus have jurisdiction over the instant appeal.

The case law that governs whether the defendants are entitled to qualified immunity defense is well established. *See, e.g., Givens*, 900 F.2d at 1231. Government officials are shielded from liability under section 1983 for the performance of discretionary functions "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (citations and footnote omitted). "Clearly established" law, the Supreme Court has explained, means "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

The burden on the section 1983 plaintiff at the summary judgment phase is also well defined. When the plaintiff fails to allege a violation of clearly established law, "a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery." *Mitchell*, 472 U.S. at 526 (citing *Harlow*, 457 U.S. at 818). Even when the plaintiff competently alleges the commission of acts that violate clearly established law, "the defendant is entitled to summary judgment if discovery fails to uncover evidence sufficient to create a genuine issue as to whether the defendant in fact committed those acts." *Id.*; *see also Hay*, 931 F.2d at 460 (defendant entitled to summary judgment if discovery failed to uncover sufficient evidence to create a genuine issue as to whether his conduct violated clearly established law); *Johnson v. Boreani*, 946 F.2d 67, 70 (8th Cir. 1991) [*Boreani*] (same).

We review the district court's denial of summary judgment de novo, applying the same standard the district court invoked to decide the motion. *Hay*, 931 F.2d at 460. Summary judgment is appropriate when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). We view the evidence in the light most favorable to the non-moving party and draw all reasonable inference in favor of the non-moving party. *Hay*, 931 F.2d at 460 (citation omitted).

Taylor seeks to recover via section 1983 under the eighth amendment, which prohibits cruel and unusual punishment. Cruel and unusual punishment constitutes the " 'unnecessary and wanton infliction of pain.' " *Estelle v. Gamble*, 429 U.S. 97, 104 (1976) (quoting *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (joint opinion)). In order to demonstrate an eighth amendment violation upon the basis of inadequate medical care, a prisoner must allege acts or omissions that reveal "deliberate indifference to serious medical needs." *Estelle*, 429 U.S. at 104, 106. A physician's mere negligent failure to diagnose or treat a condi-

tion fails to state a valid claim of mistreatment under the eighth amendment. *E.g., id.* at 105-06; *Givens*, 900 F.2d at 1231.

Taylor essentially alleges that the defendants withheld medical treatment in order to coerce him into confessing that he ingested drug-filled balloons. At the time in question, February 1987, the law in this circuit was "clearly established" within the meaning of *Harlow*. 457 U.S. at 818. This court has repeatedly held that a prisoner's mere difference of opinion over matters of expert medical judgment or a course of medical treatment failed to rise to the level of a constitutional violation. *E.g., Randall v. Wyrick*, 642 F.2d 304, 308 (8th Cir. 1981) (citations omitted); *Martin v. Sargent*, 780 F.2d 1334, 1339 (8th Cir. 1985) (citation omitted). Nor was an alleged delay in the receipt of medical treatment sufficient to state a claim of deliberate indifference in and of itself. *Compare Fields v. Gander*, 734 F.2d 1313, 1315 (8th Cir. 1984) (county sheriff allegedly delayed prisoner's access to dental care for three weeks to compel payment of bill for earlier dental services) *with Mills v. Smith*, 656 F.2d 337, 340 (8th Cir. 1981) (record failed to support prisoner's allegations that officials said he could go to the hospital only after he made a statement favorable to the police officer who accidentally shot him). An allegation of deliberate indifference to an inmate's need for surgery, however, was sufficient to state a section 1983 claim. *See, e.g., Toombs v. Bell*, 798 F.2d 297, 298 (8th Cir. 1986) (prison nurse and doctor allegedly ignored inmate request for treatment of gallstones, making surgery to remove gallbladder necessary) (citations omitted); *Johnson v. Clinton*, 763 F.2d 326, 328 (8th Cir. 1985) (warden allegedly refused to approve necessary hernia operation and assigned inmate to excess work detail); *Cotton v. Hutto*, 540 F.2d 412, 415 (8th Cir. 1976) (prison official allegedly refused to grant request for hernia operation). Thus, a reasonable prison official in February 1987 would have understood that deliberate indifference to an inmate's need for surgery for a ruptured appendix violated clearly established eighth amendment law.

Taylor's basic allegation would be sufficient, we believe, to state a violation of clearly established eighth amendment law. If Grewe, Doerhoff and Bowers are to succeed with their defense of qualified immunity, therefore, it must be for the second reason set forth in *Mitchell*: Taylor's failure to uncover sufficient evidence to create a genuine issue as to whether the defendants committed the allegedly unlawful acts. 472 U.S. at 526. As for Grewe and Doerhoff, we conclude that this is the case.

A. Grewe

The appellants contend that Dr. Grewe neither knew nor should have known that his conduct on February 1, 1987 violated Taylor's constitutional right to treatment of a serious medical condition. Appellants' Br. at 16. Nor does the evidence support an inference that Grewe withheld treatment in order to coerce a confession about drug-filled balloons. *Id.* at 17. Taylor asserts that the evidence permits an inference that (1) Grewe knew or should have known that Taylor was admitted with pain and nausea; (2) Taylor as dehydrated and vomiting blood; (3) Taylor's serious condition required an immediate surgical consult; and (4) Taylor was under suspicion for swallowing contraband. Appellee's Br. at 13.

In his deposition, Grewe stated that Taylor "exhibited a generalized fairly nonspecific-type of abdominal pain." App. 59. Grewe found that Taylor had no "rebound tenderness," a common symptom of an inflamed appendix. *Id.* at 62, 64-65. Taylor had a normal white blood count, a normal bowel movement and no nausea or vomiting. *Id.* at 69.

After completing a physical examination and reviewing lab results and x-rays, Grewe concluded that Taylor suffered from abdominal pain of unknown etiology. *Id.* at 61. He decided to err "on the conservative side" and had Taylor admitted to the hospital for observation. *Id.* at 60-61, 66. Neither Taylor nor anyone else told Grewe that the inmate had vomited blood. *Id.*

at 69. Nor do Grewe's clinical notes from the February 1 examination make any mention of contraband or vomiting blood. *Id.* at 128. The nurses who knew about the balloon rumors do not indicate that Grewe had any knowledge of the suspicions lodged against Taylor.

After reviewing the record as a whole and drawing all inferences in favor of the non-moving party, we find no support for Taylor's allegations that Grewe was deliberately indifferent to his serious medical needs. Taylor has failed to produce sufficient evidence to create a genuine issue that Grewe deliberately withheld treatment in order to secure a confession about drug use. On the contrary, the evidence suggests that Grewe engaged in a properly conservative course of medical treatment. If generally construed as a claim of negligence against Grewe for failure to diagnose and treat his ruptured appendix, Taylor's claim fails as negligence is not actionable under section 1983. *Estelle*, 429 U.S. at 105-06; *Givens*, 900 F.2d at 1231. Accordingly, we hold that Grewe is entitled to summary judgment on the basis of qualified immunity. *See Mitchell*, 472 U.S. at 526; *Hay*, 931 F.2d at 460.

B. Doerhoff

Appellants maintain that Dr. Doerhoff neither knew nor should have known that his conduct violated Taylor's right to treatment for a serious medical need. Even if Doerhoff were aware that prison officials suspected that Taylor swallowed drug-filled balloons, Taylor produced no evidence to suggest that Doerhoff's surgical and post-operative treatment rose to the level of deliberate indifference. Appellants' Br. at 20-21. Taylor responds that a reasonable jury could conclude that Doerhoff knew or should have known that he continued to experience pain after the surgery due to an abscess. Appellee's Br. at 14-15.

Dr. Doerhoff stated in his deposition that unlike most appendicitis patients, Taylor lacked a high white blood count and a

rigid abdomen. App. 323. Doerhoff initially concluded, before surgery, that Taylor had a small bowel obstruction. *Id.* at 109. After making an incision and discovering pus throughout the abdomen, Doerhoff removed the appendix and inserted drains. *Id.* at 111. He prescribed pain medication and antibiotics. *Id.* at 325, 333. Doerhoff stated that Taylor received the identical care as his patients in private practice and that there was "no delay" in surgery considering Taylor's symptoms, white blood count and temperature. *Id.* at 333.

Doerhoff indicated that the possibility that Taylor had swallowed contraband was properly part of the "differential diagnosis." *Id.* at 334. He stated that "[w]e have patients swallowing lots of things [in the prison], and contraband is very common." *Id.* Nowhere does the record support Taylor's allegation, however, that Doerhoff delayed surgery in order to secure a confession. Nor does deposition testimony, even when viewed in the light most favorable to Taylor, create a genuine issue that Doerhoff intentionally provided defective post-operative treatment. The affidavit of Dr. Glenn A. Barr, upon which the Magistrate Judge relied to recommend against the grant of summary judgment, merely creates an inference of negligence upon the part of all the defendants. *Id.* at 229-32. Accordingly, Taylor has failed to uncover sufficient evidence of deliberate indifference and Doerhoff is entitled to summary judgment upon the basis of qualified immunity. *Mitchell*, 472 U.S. at 526; *Hay*, 931 F.2d at 460.

C. Bowers

Appellants assert that Dr. Bowers neither knew nor should have known that his conduct violated Taylor's right to treatment of a serious medical condition. Although Bowers concedes that he questioned Taylor about ingestion of contraband, he maintains that the only reasonable inference that can be drawn from this evidence is that Bowers attempted to treat a small bowel

obstruction by inserting a nasogastric tube. Appellants' Br. at 25-26. Taylor contends that a reasonable jury could conclude, on the basis of Bower's conduct as a whole, that his treatment rose to the level of deliberate indifference to a serious medical need. Appellee's Br. at 13-14.

Dr. Bowers stated in his deposition that he received information around noon on February 3, 1987 that Taylor might have swallowed a balloon. App. 72. His phone log confirms this contention. *Id.* at 85. Bowers stated that he went to speak with Taylor a few hours later to "try to get him to cooperate with the [nasogastric] tube" and to "tell us truthfully what had happened with the balloon." *Id.* at 77. He indicated to Taylor, "if we knew it was a balloon, that would help us to get to the cause of the problem sooner." *Id.* at 102. On Taylor's MSP hospital progress report, Bowers noted the following:

> P[atien]t denied swallowing anything. In mild to mod[erate] distress [with] hiccups. Abd[ominal] x ray shows gaseous dilation et [sic] air fluid levels. Explained this to p[atien]t as well as why we need to know what has happened et [sic] why he needs to follow instructions. *Explained consequences.*

Id. at 128 (emphasis added).

Bowers denied that he withheld treatment in order to coerce Taylor to admit that he swallowed a drug balloon. *Id.* at 102. Bowers asserted that he would have called a surgeon sooner had Taylor cooperated by keeping the nasogastric tube in place. *Id.* at 88, 98. Bowers also conceded that if he had not believed Taylor's denials, he "might have called a surgeon a little bit sooner." *Id.* at 103.

After reviewing the record as a whole, we conclude that Taylor produced sufficient evidence to create a genuine issue as to whether Bowers intentionally prolonged surgical intervention

in order to prompt the inmate to confess that he swallowed a drug-filled balloon. Bower's conversation with the patient, his deposition testimony, and his notations in the patient's progress report create an issue that Bowers violated clearly established law. Accordingly, Bowers is not entitled to qualified immunity. *Mitchell,* 472 U.S. at 526; *Hay,* 931 F.2d at 460. We affirm the denial of summary judgment with respect to Dr. Bowers only. Our affirmance does not in any way indicate any view, however, of the validity of the prisoner's case against Bowers.

We need not discuss extensively appellants' second claim of error, which related to an alleged eleventh amendment bar to Taylor's state law negligence claims. As we have previously held that Grewe and Doerhoff are entitled to qualified immunity, this issue remains viable only with respect to Bowers. Appellants allege that the eleventh amendment bars Taylor from seeking monetary relief from Bowers because the state is the real party in interest. We believe that the appellants misread the applicable law.[3]

Taylor sued Bowers for damages in his official and individual capacity, alleging violations of the United States Constitution and state law. The eleventh amendment does not prohibit a suit for damages against a state officer in his individual capacity. *DeYoung v. Patten,* 898 F.2d 628, 635 (8th Cir. 1990); *Nix v. Norman,* 879 F.2d 429, 432-33 & n.3 (8th Cir. 1989). Nor does the eleventh amendment shield Bowers from liability in his official capacity for acts which violate the United States Constitution. *Norman,* 879 F.2d at 432 (citing *Ex Parte Young,* 209 U.S. 123 (1908)). Accordingly, no jurisdictional bar precludes us from remanding to the district court.

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[3] *Pennhurst State School and Hospital v. Halderman,* 465 U.S. 89, 117 (1984) holds that the eleventh amendment proscribes a federal suit against state officials on the basis of state law when the sought-after relief would have a direct impact on the state.

III. CONCLUSION

We reverse the denial of summary judgment on behalf of Doctors Grewe and Doerhoff, who are entitled to qualified immunity. We affirm the denial of summary judgment with respect to Dr. Bowers and remand for trial.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

No. 87-4263-CV-C-5

WESLEY TAYLOR,
Plaintiff,

v.

DR. RICHARD K. BOWERS, D.O., et al.,
Defendants.

ORDER

[Filed: August 8, 1990]

By report of June 21, 1990, the United States Magistrate to whom this cause has been referred recommended the denial of defendants' motion for summary judgment. The parties were advised they could file written exceptions to the recommendation, pursuant to 28 U.S.C. § 636(b)(1)(C).

A *de novo* review of the record in this cause, including the exceptions to the recommendation filed by defendants on July 11, 1990, convinces the court that the recommendation of the Magistrate is correct in all respects and should be adopted.

IT IS, THEREFORE, ORDERED that defendants' motion of September 7, 1989, for summary judgment should be and it is hereby denied.

/s/ Scott O. Wright
SCOTT O. WRIGHT
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

No. 87-4263-CV-C-5

WESLEY TAYLOR,
Plaintiff,

v.

DR. RICHARD K. BOWERS, D.O., et al.,
Defendants.

REPORT, RECOMMENDATION AND ORDER OF THE UNITED STATES MAGISTRATE

[Filed: June 21, 1990]

Plaintiff, an inmate confined in a Missouri penal institution, commenced this action under the Civil Rights Act of 1871, 42 U.S.C. § 1983, and its corresponding jurisdictional statute, 28 U.S.C. § 1343. Following the filing of this cause, it was referred to the undersigned United States Magistrate for processing in accordance with the Magistrate Act, 28 U.S.C. § 636, and W.D.Mo.R. 22.

On September 7, 1989, defendants Bowers, Grewe and Doerhoff filed a motion for summary judgment on the basis that there was no material disputes of fact and they are entitled to judgment as a matter of law. Plaintiff responded thereto.

Facts

In his second amended complaint, filed after defendants' motion for summary judgment, plaintiff states he reported to the Missouri State Penitentiary Hospital at approximately 1:00 p.m. on February 1, 1987. Plaintiff stated he had repeatedly thrown

up blood and had a severe burning pain in his stomach. Plaintiff was questioned about drug ingestion and examined. He states he was told by defendant Grewe that he appeared to have a bowel obstruction. Plaintiff remained at the hospital and continued to complain of pain and to vomit. Sometime on February 4, 1987, exploratory surgery was performed and thereafter, plaintiff was informed he had been suffering from a ruptured appendix. Following the surgery, plaintiff continued to have recurring stomach pains and vomiting, and on February 16, 1987, was transferred to the University of Missouri — Columbia Hospital and Clinics, where a second surgery was performed to drain an abscess.

Summary Judgment Standard

Fed.R.Civ.P. 56(c) requires "the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986). The burden on the party moving for summary judgment "is only to demonstrate . . . that the record does not disclose a genuine dispute on a material fact." *City of Mt. Pleasant, Iowa v. Associated Elec. Co-Op.,* 838 F.2d 268, 273 (8th Cir. 1988).

Once the moving party has done so, the burden shifts to the nonmoving party to go beyond his pleadings and show, by affidavit or by "depositions, answers to interrogatories, and admissions on file," that there is a genuine issue of fact to be resolved at trial. *Celotex,* 477 U.S. at 323. Evidence of a disputed factual issue which is merely colorable or not significantly probative, however, will not prevent entry of summary judgment. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986).

Summary judgment, however, "is an extreme remedy, to be granted only if no genuine issue exists as to any material fact."

Hass v. Weiner, 765 F.2d 123, 124 (8th Cir. 1985). In ruling on a motion for summary judgment, this court must view all facts in a light most favorable to the nonmoving party, and that party must receive the benefit of all reasonable inferences drawn from the facts. *Robinson v. Monaghan*, 864 F.2d 622, 624 (8th Cir. 1989).

If "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law," the court must grant summary judgment. Fed.R.Civ.P. 56(c).

Discussion

In this case, plaintiff asserts defendants were deliberately indifferent to his serious medical needs, committed malpractice, and acted as if plaintiff had swallowed "balloons" which had caused his condition. Defendants state they engaged in adequate and initially conservative treatment of plaintiff's condition and that they are entitled to judgment as a matter of law.

Upon review of the depositions, suggestions, and affidavits on file, it appears there are material facts in dispute. Plaintiff claims certain treatment was withheld in an effort to get him to admit to ingesting balloons. Defendants state they followed a conservative treatment in accordance with acceptable medical practice, and had no improper motive. An affidavit signed by Dr. Glenn A. Barr and submitted by plaintiff states plaintiff was not treated for his pain; was obviously dehydrated and did not receive hydration or provision for maintenance of his nutritional status; there was no identifiable course of medical treatment or diagnostics order; consultation with a surgeon was delayed; and plaintiff's post-operative care was not within minimal standards. Dr. Barr also states defendants' failure to render necessary medical treatment resulted in damage to plaintiff. Under these circumstances, summary judgment is inappropriate.

A review of the record in this cause does not show defendant Ernest Cowles has been served with a copy of the summons and complaint. Fed.R.Civ.P. 4(j) provides for dismissal of parties for whom service of process has not been made within 120 days after the filing of the complaint. Plaintiff's second amended complaint was filed on December 13, 1989. More than 120 days has passed, and defendant Cowles should be dismissed as a party unless plaintiff can show good cause for not obtaining service.

IT IS, THEREFORE, ORDERED that within twenty (20) days hereof, plaintiff show cause in writing why his claims against defendant Cowles should not be dismissed pursuant to Fed.R.Civ.P. 4(j).

For the forestated reasons and pursuant to the provisions of 28 U.S.C. § 636, it is

RECOMMENDED that defendants' motion of September 7, 1989, for summary judgment be denied.

Under 28 U.S.C. 636(b)(1), the parties may make specific written exceptions to any or all of the foregoing recommendations within twenty (20) days of their receipt thereof. If additional time is needed to file exceptions, a motion requesting such time should be filed within said twenty days, giving the reasons for the request. *See Nettles v. Wainwright,* 656 F.2d 986 (5th Cir. 1981); *Messimer v. Lockhart,* 702 F.2d 729 (8th Cir. 1983); *Thomas v. Arn,* 474 U.S. 140 (1985); *Nash v. Black,* 781 F.2d 665 (8th Cir. 1986). The parties are advised that failure to make specific written exceptions to this Report and Recommendation may result in a waiver of their right to appeal.

Dated this 21st day of June, 1990.

/s/ William A. Knox
WILLIAM A. KNOX
United States Magistrate

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 90-2539WMJ

Wesley Taylor,
Appellee,

vs.

Richard K. Bowers, et al.,
Appellants.

Appeal from the United States District Court
for the Western District of Missouri

The suggestion for rehearing en banc is denied.

Appellee's petition for rehearing to the panel is granted in part. The panel opinion is modified as to point 4 raised by appellee Wesley Taylor: "Dismissal of a state law negligence claim on the merits is not appropriate where the Court grants summary judgment on claims under 42 U.S.C. §1983 because state substantive law is controlling on the pendent claim."

Pages 15 and 16 of the original panel opinion filed June 10, 1992 are substituted with the attached pages 15 and 16. All other contentions raised by appellee are rejected.

Judge Loken would deny the appellee's petition for rehearing in its entirety.

July 31, 1992

Order Entered at the Direction of the Court:
/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

We need not discuss extensively appellants' second claim of error, which relates to an alleged eleventh amendment bar to Taylor's state law negligence claims. Appellants allege that the eleventh amendment bars Taylor from seeking monetary relief from Bowers because the state is the real party in interest. We believe that the appellants misread the applicable law.[3]

Taylor sued Bowers for damages in his official and individual capacity, alleging violations of the United States Constitution and state law. The eleventh amendment does not prohibit a suit for damages against a state officer in his individual capacity. *DeYoung v. Patten*, 898 F.2d 628, 635 (8th Cir. 1990); *Nix v. Norman*, 879 F.2d 429, 432-33 & n.3 (8th Cir. 1989). Nor does the eleventh amendment shield Bowers from liability in his official capacity for acts which violate the United States Constitution. *Norman*, 879 F.2d at 432 (citing *Ex Parte Young*, 209 U.S. 123 (1908)). Accordingly, no jurisdictional bar precludes us from remanding to the district court.

III. CONCLUSION

We reverse the denial of summary judgment on behalf of Doctors Grewe and Doerhoff, who are entitled to qualified immunity on the section 1983 claim. We affirm the denial of summary judgment with respect to Dr. Bowers and remand for trial. We remand the negligence claim against Grewe and Doerhoff to the district court.[4]

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[3] *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 117 (1984) holds that the eleventh amendment proscribes a federal suit against state officials on the basis of state law when the sought-after relief would have a direct impact on the state.

[4] Initially, the complaint alleged section 1983 and negligence claims against all three defendants. The section 1983 and negligence claims remain against Bowers alone. With respect to the negligence claims, we do not address whether defendants Grewe and Doerhoff remain in the lawsuit as

(Footnote 4 continued on next page)

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Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT

(Footnote 4 continued)

pendant parties to the civil rights claim against Bowers. We refer the parties and the district court to the following cases which may be pertinent. *E.g., Finley v. United States*, 490 U.S. 545 (1989); *Sarmiento v. Texas Bd. of Veterinary Medical Examiners*, 939 F.2d 1242, 1248 (5th Cir. 1991); *Ortega v. Schramm*, 922 F.2d 684, 690-93 (11th Cir. 1991); *Stallworth v. City of Cleveland*, 893 F.2d 830, 838 (6th Cir. 1990); *Rodriguez v. Comas*, 888 F.2d 899, 904 (1st Cir. 1989); *see also Lockard v. Missouri Pacific R. Co.*, 894 F.2d 299 (8th Cir. 1990) (pendent party jurisdiction not authorized by FELA).